IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Jose Padilla,	)	
	)	
Petitioner	)	
	)	
v.	)	**C/A No. 02:04-2221-26AJ**
	)	
Commander C.T. Hanft,	)	**Respondent's Opposition to the**
U.S.N. Commander,	)	**Motion for Summary Judgment**
Consolidated Naval Brig,	)	
	)	
Respondent	)	
	)	

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Pursuant to Local Rule 7.06 and this Court's September 27, 2004, scheduling order, Respondent Commander C.T. Hanft, Commanding Officer of the Consolidated Naval Brig in Charleston, South Carolina, by and through undersigned counsel, respectfully submits this Opposition to petitioner's motion for summary judgment on the petition for writ of habeas corpus.

Petitioner's legal challenge to the Executive's authority to detain him as an enemy combatant is without merit. If the facts pleaded by the government are taken as a given, as they must be at this stage of the litigation, then the military has every right to detain petitioner as an enemy combatant. Petitioner attended al Qaeda training camps in Afghanistan. When the United States commenced combat operations against al Qaeda and the Taliban after the September 11 attacks, petitioner took cover in Afghanistan with other al Qaeda operatives, and evaded United States forces and airstrikes. Armed with an assault rifle, he later traveled with other al Qaeda operatives to Pakistan, escorted by Taliban personnel. In Pakistan, he met with senior Al Qaeda operatives, including Khalid Sheikh Mohammed (KSM), to propose additional terrorist attacks on the United States. Petitioner accepted

an assignment from KSM to come to the United States to advance the conduct of terrorist attacks within the United States.

In *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court confirmed that the military may seize and detain such enemy combatants for the duration of the conflict with al Qaeda. Although petitioner argues that *Hamdi* does not extend to U.S. citizens captured in the United States, Hamdi himself was a United States citizen. The reason petitioner was captured in the United States is that (unlike Hamdi) he eluded capture in Afghanistan, and then came to America to launch terrorist attacks here. If anything, that makes him more, not less, of an enemy combatant. Because petitioner associated himself with the armed forces of the enemy, and "enter[ed] this country bent on hostile acts" with the "aid, guidance and direction" of the enemy, he is an enemy combatant under settled law. *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

Although petitioner argues that the President may act only pursuant to congressional authorization, and that Congress has not authorized the President to exercise his constitutional powers over enemy combatants who enter the United States, Congress authorized the use of military force against al Qaeda precisely "in order to prevent any future acts of international terrorism against the United States." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001). Given that Congress was acting in response to attacks on the United States homeland, launched by combatants who were within the Nation's borders, it is inconceivable that Congress intended to authorize the seizure of enemy combatants abroad but not at home. Nothing in the AUMF remotely suggests such an implausible intent. Instead, the statute states that it seeks to "protect United States citizens both at home and abroad." 115 Stat. 224. Accordingly, petitioner's detention as an enemy combatant is fully consistent with the AUMF and the President's

authority as Commander in Chief.

STATEMENT

One week after the September 11 attacks, Congress enacted the AUMF, providing legislative support for the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224, § 2(a). The AUMF specifically recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and it emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," "render[ing] it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." *Id.*, Preamble. Soon after the AUMF's enactment, the President made it express that the September 11 attacks "created a state of armed conflict" with al Qaeda. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 1(a). In the course of that armed conflict, the United States military has seized and detained numerous persons who were fighting for and associated with the enemy.

Petitioner is one such person detained militarily as an enemy combatant.[1] In February 2000,

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[1] Because "[t]he parties have agreed to have the threshold legal issue of the President's authority decided now," the following "facts pleaded by the Executive branch are assumed to be true" for purposes of this motion, although petitioner has reserved the right to dispute some of them at a later point. Mem. in Support of Mot. for Summary Judgment (Mem.) 1, 2 n.1.

while in Saudi Arabia on a religious pilgrimage, petitioner met with an al Qaeda recruiter and discussed al Qaeda training opportunities in Afghanistan. Rapp Declaration (Rapp Dec., Exh. B to Answer) ¶ 7. In the summer of 2000, petitioner visited a Taliban safehouse in Quetta, Pakistan, a city near the Afghan border. *Id.* ¶ 8. From there, he crossed the border into Kandahar, Afghanistan, in the company of Taliban operatives and other recruits, to train for jihad. *Ibid.* In July 2000, he completed the requisite training-camp application, executing the document with one of his aliases, Abdullah al Muhajir. *Ibid.* In September and October 2000, he attended the al Qaeda-affiliated al-Farouq training camp just north of Kandahar, where he received training in the use of explosives, weapons, camouflage, and communications. *Ibid.* While at the camp, petitioner met several times with Mohammed Atef, a senior al Qaeda operative and military commander. *Ibid.* In the fall of 2000, after successfully completing the training, petitioner and several other new recruits spent three months just north of Kabul, Afghanistan, guarding what petitioner understood to be a Taliban outpost. *Ibid.* For this guard duty, petitioner was armed with a Kalashnikov assault rifle and ammunition. *Ibid.*

After spending the spring of 2001 in Egypt, petitioner returned in June 2001 to Quetta, where he stayed at an al Qaeda safehouse. Rapp Dec. ¶ 9. Soon thereafter, he returned to Kandahar, where he met with Atef at another al Qaeda safehouse. *Id.* ¶ 11. Atef asked whether petitioner would undertake a mission to blow up apartment buildings in the United States through the use of natural gas. *Ibid.* Petitioner agreed to the mission. *Ibid.* Accordingly, Atef sent petitioner to an al Qaeda training camp near Kandahar, where he received further training from an al Qaeda explosives expert. *Ibid.* During this training, petitioner learned, among other things, how to prepare and seal an apartment in order to obtain the highest explosive yield and thereby inflict the largest number of

resident casualties. *Ibid.*

In the fall of 2001, petitioner was staying at an al Qaeda safehouse in or near Kandahar when he and his fellow al Qaeda operatives learned of the September 11 terrorist attacks. Rapp Dec. ¶ 9. After the attacks, he spent much of his time with Atef at an al Qaeda safehouse in or near Kandahar. *Ibid.* When the United States commenced combat operations against the Taliban and al Qaeda, petitioner and other al Qaeda operatives moved from safehouse to safehouse to avoid bombing or capture. *Ibid.* In November 2001, United States forces bombed the safehouse where Atef was staying. *Id.* ¶ 10. The attack killed Atef. *Ibid.* Petitioner was staying at a different al Qaeda safehouse on that day, but he returned to assist in retrieving Atef's body from the rubble. *Ibid.*

After Atef was killed, petitioner and several other al Qaeda operatives began moving towards Afghanistan's mountainous border with Pakistan in order to evade United States forces and air strikes. Rapp Dec. ¶ 10. Petitioner was armed with an assault rifle during this time. *Ibid.* After taking cover in a network of caves and bunkers near Khowst, Afghanistan, petitioner and the other operatives were escorted into Pakistan by Taliban personnel. *Ibid.* Petitioner crossed into Pakistan in January 2002. *Ibid.*

Soon after entering Pakistan, petitioner met with senior Osama bin Laden lieutenant Abu Zubaydah on two different occasions at safehouses in Lahore and Faisalabad. Rapp Dec. ¶ 10. The two men discussed the possibility of conducting terrorist operations involving detonation of explosives within the United States. *Ibid.* Consistent with these discussions, petitioner conducted what he called "research" on the construction of an atomic bomb. *Ibid.*

In March 2002, Zubaydah sent petitioner and an accomplice to Karachi, Pakistan, to present the atomic bomb operation to Khalid Sheikh Mohammad (KSM), al Qaeda's operations leader.

Rapp Dec. ¶ 12. Zubaydah gave petitioner some money and wrote KSM a reference letter on petitioner's behalf. *Ibid.* KSM met with petitioner and his accomplice at an al Qaeda safehouse. *Ibid.* KSM believed that the atomic bomb plot was too complicated, but he suggested that petitioner and his accomplice revive the plan to detonate apartment buildings through the use of natural gas, as petitioner had initially discussed with Atef. *Ibid.* Petitioner accepted the assignment, and KSM gave him full authority to conduct the operation if he and his accomplice were successful in entering the United States. *Ibid.*

Before departing for the United States, petitioner received training from Ramzi Bin al-Shibh, a senior al Qaeda operative, on the secure use of telephones and e-mail protocols. Rapp Dec. ¶ 12. Petitioner also received $5,000 from KSM and an additional $10,000 from al Qaeda facilitator and planner Ammar al-Baluchi. *Ibid.* Finally, petitioner was supplied with travel documents, a cell phone, and an e-mail address to notify al-Baluchi upon arrival in the United States. *Ibid.* The night before his departure, petitioner attended a dinner with KSM, al-Baluchi, and Bin al-Shibh. *Ibid.*

On May 8, 2002, petitioner flew from Zurich, Switzerland, to Chicago's O'Hare International Airport. Stipulations of Fact (Stipulations) ¶ 3. Petitioner was monitored by FBI agents in the Zurich airport and while on the plane. After arriving in Chicago, petitioner was detained in the customs inspection area, where he was interviewed by Customs Inspectors and FBI agents. *Id.* ¶¶ 6-8. He initially submitted to questioning but eventually refused to continue the interview without legal representation. *Ibid.* The interviewing agents arrested him shortly thereafter pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York. *Id.* ¶¶ 9-10. Petitioner was carrying $10,526 in currency, the cell phone that he had been given, and the e-mail address that he was to use to update al-Baluchi. Rapp Dec. ¶ 13.

On June 9, 2002, the President—"as * * * Commander in Chief of the U.S. armed forces," and "[i]n accordance with the Constitution and consistent with the laws of the United States, including the [AUMF]"—made a formal determination that petitioner "is, and at the time he entered the United States in May 2002 was, an enemy combatant."[2] President's Order ¶ 1 (Exh. A to Answer). The President found, in particular, that petitioner: is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," *id.* ¶ 2; has "engaged in * * * hostile and war-like acts, including conduct in preparation for acts of international terrorism" against the United States, *id.* ¶ 3; "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States," *id.* ¶ 4; and "represents a continuing, present and grave danger to the national security of the United States," such that his detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens," *id.* ¶ 5. The President thus directed the Secretary of Defense "to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant." *Ibid.*

Immediately upon issuance of the President's Order, the Department of Justice moved the District Court for the Southern District of New York to vacate the material witness warrant, and the motion was granted. That same day, petitioner was transferred to military control and taken to the Consolidated Naval Brig, Charleston, South Carolina, where he has since been detained.[3]

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[2] Respondent's Answer describes the multi-layered executive process that culminated in the enemy-combatant determination. Answer 3-4.

[3] Respondent's Answer recounts the litigation of petitioner's habeas claims in the Southern District of New York, the Second Circuit, and the Supreme Court. Answer 7-8. It suffices to say here that the Supreme Court ultimately granted review of two questions—"[f]irst, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the President

ARGUMENT

Petitioner is not entitled to summary judgment on Count One of his petition because there is no constitutional barrier to his detention. See Section I, *infra*. Petitioner is not entitled to summary judgment on Count Two because there is no statutory barrier to his detention; instead, Congress statutorily authorized the detention in the AUMF. See Section II, *infra*.

I. The President Has Constitutional Authority To Detain Petitioner As An Enemy Combatant Without Charging Him Criminally.

Petitioner renews his claim, from Count One of the habeas petition (Pet. 4-5, ¶¶ 20-22), that his detention as an enemy combatant without criminal charges violates the Constitution because American citizens arrested in the United States may only be detained pursuant to the criminal process. Mem. 22-34. But the Supreme Court's decisions in *Hamdi*, 124 S. Ct. at 2633, and *Quirin*, 317 U.S. at 1, reaffirm the military's long-settled authority—independent of and distinct from the criminal process—to detain enemy combatants for the duration of a given armed conflict, including the current conflict against al Qaeda. Those decisions squarely apply to this case.

A. The military has authority to detain enemy combatants in the course of the conflict against al Qaeda.

1. *Hamdi* confirmed that the military may seize and detain enemy combatants for the duration of the conflict with al Qaeda. The decision upheld the President's authority, under the AUMF, to detain as an enemy combatant a presumed American citizen who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 124 S. Ct. at 2639 (plurality opinion); accord

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possess authority to detain Padilla militarily"—and answered only the first, explicitly declining to reach the second. *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711, 2715 (2004).

id. at 2679 (Thomas, J., dissenting) (agreeing that AUMF authorized detention). As the controlling opinion for the Court explained,[4] the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice' are 'important incident[s] of war.' " 124 S. Ct. at 2640 (plurality) (quoting *Quirin*, 317 U.S. at 28); accord *id.* at 2679 (Thomas, J., dissenting); see also *Johnson* v. *Eisentrager*, 339 U.S. 763, 786 (1950) ("This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over * * * enemy belligerents [and] prisoners of war.' " (quoting *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313 (1946))). Such military detention is not for the purpose of imposing criminal or other punishment but instead serves to "prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 124 S. Ct. at 2640 (plurality).

Because this sort of preventive detention "is a fundamental incident of waging war," the *Hamdi* Court held, "it is of no moment that the AUMF does not use specific language of detention." *Id.* at 2641 (plurality); see *id.* at 2679 (Thomas, J., dissenting). Rather, "Congress' grant of authority for the use of 'necessary and appropriate force' * * * include[s] the authority to detain for the duration of the relevant conflict," an "understanding * * * based on longstanding law-of-war principles." *Id.* at 2641 (plurality); see *id.* at 2679 (Thomas, J., dissenting). It is therefore clear after *Hamdi* that the President has authority pursuant to the AUMF to detain enemy combatants for the

[4] The plurality opinion of Justice O'Connor is the controlling opinion with respect to the President's authority to detain enemy combatants because Justice Thomas concurred on grounds that were even more deferential to the President. See *id.* at 2674-2685 (Thomas, J., dissenting); *Ramdass* v. *Angelone*, 187 F.3d 396, 403 (4th Cir. 1999) ("We recognize Justice O'Connor's concurrence as the controlling opinion in *Simmons* because it represents the narrowest grounds upon which a majority of the Court agreed.").

duration of the current conflict.[5]

2. Because the *Hamdi* Court concluded that the detention was authorized by the AUMF, it had no occasion to address the President's inherent authority as Commander in Chief to detain a citizen as an enemy combatant. 124 S. Ct. at 2639 (plurality). The issue need not be addressed here either because the AUMF supplies an ample statutory foundation for petitioner's military detention. See *infra* pp. 24-27.

Nonetheless, Congress specifically recognized in the AUMF that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," 115 Stat. 224, Preamble, and such authority supplies an independent basis for petitioner's detention. The Commander-in-Chief Clause grants the President the power to defend the Nation when it is attacked, and he "is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). An essential aspect of the President's authority in this regard is to "determine what degree of force the crisis demands." *Id.* at 670; see *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring) ("[T]he President has independent authority to repel aggressive acts by third parties even

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[5] The Court's holding that the AUMF encompasses the detention of Hamdi, a Taliban combatant, applies *a fortiori* to al Qaeda combatants like petitioner. As the controlling opinion explains, "[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported *the al Qaeda terrorist network responsible for those attacks*, are individuals Congress sought to target in passing the AUMF." 124 S. Ct. at 2640 (emphasis added). There could be even less doubt that Congress in the AUMF sought to target combatants for al Qaeda, given that al Qaeda was directly responsible for the September 11 attacks. 115 Stat. 224, § 2(a) (supporting use of "all necessary and appropriate force against," *inter alia*, those "organizations" that the President "determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"); see President's Order ¶ 2 (stating that "al Qaeda" is "an international terrorist organization with which the United States is at war").

without specific congressional authorization, and courts may not review the level of force selected."), cert. denied, 531 U.S. 815 (2000). The President's decision to detain petitioner as an enemy combatant represents a basic exercise of his authority as Commander in Chief to determine the level of force needed to prosecute the conflict against al Qaeda.

Contrary to petitioner's argument (Mem. 29), nothing in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), casts doubt on the President's authority in this case. The President's order in *Youngstown* that the Secretary of Commerce take control of private steel mills to prevent a work stoppage is different in kind from the President's order that the Secretary of Defense detain petitioner as an enemy combatant. The former represents a domestic economic initiative, while the latter represents a core exercise of the President's Commander-in-Chief power, which is at its height when the Nation itself comes under attack. *The Prize Cases*, 67 U.S. at 668; see *Padilla* v. *Rumsfeld*, 352 F.3d 695, 727 (2d Cir. 2003) (Wesley, J., concurring in part and dissenting in part) (whereas in *Youngstown* "the President's attempt to link the [steel] seizure to prosecuting the war in Korea was * * * too attenuated," "[i]n this case the President's authority is directly tied to his responsibilities as Commander in Chief").

B. The President's authority to detain enemy combatants in the current conflict is fully applicable in the circumstances of this case.

After *Hamdi*, petitioner cannot colorably challenge the President's authority to detain enemy combatants, including United States citizens, in the course of the ongoing conflict against al Qaeda. Instead, petitioner argues that the authority recognized in *Hamdi*—to seize and detain "individuals captured on an overseas battlefield" in "the context of conventional armed conflict," Mem. 6—does not extend to "U.S. citizens arrested in civilian settings in the United States," *id.* at 8. Thus,

petitioner claims that the President has no authority to detain him as an enemy combatant absent congressional suspension of the writ of habeas corpus. *E.g.*, *id.* at 26-27. Under both *Hamdi* and *Quirin*, this line of reasoning fails.[6]

1. Both *Hamdi* and *Quirin* make clear that petitioner's American citizenship is not, in and of itself, relevant to the President's authority to detain him militarily. Again, *Hamdi* involved a presumed American citizen, and the Court emphasized that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." 124 S. Ct. at 2640 (plurality); accord *id.* at 2679 (Thomas, J., dissenting). That conclusion was consistent with *Quirin*, which upheld the President's assertion of military control over a group of German saboteurs, including one, Haupt, who was a presumed American citizen. 317 U.S. at 20. The *Quirin* Court unanimously held that the President could treat Haupt as an enemy combatant: "Citizenship in the United States of an

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[6] Although petitioner may not have been captured abroad in a "zone of combat," Mem. 4, he errs in assuming that his detention in the customs area at O'Hare necessarily constitutes an arrest "in" the United States (*e.g.*, Mem. i, 2, 5, 6, 7, 8, 15, 16, 23 n.18, 27, 34). Under analogous case law interpreting the scope of the federal immigration laws, it is well settled that physical presence within the Nation's borders is not sufficient for "entry" into the United States. See, *e.g.*, *United States* v. *Pacheco-Medina*, 212 F.3d 1162, 1163-1166 (9th Cir. 2000); *Correa* v. *Thornburgh*, 901 F.2d 1166, 1171-1172 (2d Cir. 1990); *United States* v. *Kavazanjian*, 623 F.2d 730, 736-738 (1st Cir. 1980). Indeed, the courts have long held that an " 'entry' is not accomplished until physical presence * * * is accompanied by freedom from official restraint." *Kavazanjian*, 623 F.2d at 736 (citing cases). Petitioner, of course, was never free from official restraint. He was surveilled in Zurich and on the plane en route to the United States, and he was stopped and arrested before he left the customs inspection area. See Stipulations ¶¶ 6-10. Thus, petitioner was never permitted to leave the inspection area and join the general public. In this respect, petitioner's case parallels *Correa*, where the habeas petitioner "was arguably 'inspect[ed]' and 'admit[ted]' by an immigration officer" but "was never free from official restraint" because she "remained in a restricted area, known as the 'Customs Enclosure,' where access and egress were controlled by exit control officers, and by Customs." 901 F.2d at 1171-1172; see *id.* at 1172 ("Had she attempted to leave the enclosure, she would have been prevented from doing so by * * * Customs or USDA officers, or the exit control officer. Petitioner was thus never free to physically enter the United States or to go at large and mix with the general population.").

enemy belligerent does not relieve him from the consequences of [his] belligerency." *Id.* at 37; see *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957); *In re Territo*, 156 F.2d 142, 143-146 (9th Cir. 1946). *Hamdi* reaffirmed *Quirin* as "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances." 124 S. Ct. at 2643; accord *id.* at 2679 (Thomas, J., dissenting).

2. Moreover, nothing in the Supreme Court's case law suggests, as petitioner does (*e.g.*, Mem. 27), that the President may constitutionally detain only those belligerents captured abroad on a field of battle. To be sure, the Court in *Hamdi* noted that the "context of [that] case" involved the "battlefield capture" of an American citizen, 124 S. Ct. at 2643 (plurality), and emphasized that it was answering in the government's favor only the "narrow question" presented to it. *Id.* at 2639 (plurality). The Court framed that question, however, without reference to the location of Hamdi's capture:

> [F]or purposes of this case, the "enemy combatant" that [the government] is seeking to detain is an individual who, it alleges, was " 'part of or supporting forces hostile to the United States or coalition partners' " in Afghanistan and who " 'engaged in an armed conflict against the United States' " there. * * * We therefore answer only * * * whether the detention of citizens falling within that definition is authorized.

Ibid. It is easy to imagine a scenario in which an American citizen like Hamdi "engage[s] in an armed conflict against the United States" in Afghanistan and then escapes to the United States to attempt to engage in more violence, only to be captured and detained here by military authorities. Yet it is difficult to imagine the *Hamdi* Court reaching a different result based merely on the fact of stateside capture. The military's interest in detaining for preventive purposes one who "support[s] forces hostile to the United States," *ibid.*, does not dissipate simply because of a belligerent's location *in* the United States, especially where, as in this case, the belligerent is "bent on hostile acts"

and enters this country with the "aid, guidance and direction" of the enemy, *id.* at 2640 (quotation omitted); see Rapp Dec. ¶¶ 10, 12 (explaining how petitioner, armed with an assault rifle, evaded United States air strikes in Afghanistan, escaped to Pakistan with the aid of the Taliban, and entered the United States with plans to commit terrorist acts after receiving funds and training for that purpose from senior al Qaeda operatives). Indeed, adopting an enemy-combatant rule that turns on the locus of one's capture would provide the perverse incentive of drawing enemies to the United States, where they could potentially do the most damage yet evade military jurisdiction.

In any case, to the extent *Hamdi* did not squarely address whether the President may subject to military jurisdiction a belligerent "arrested in [a] civilian setting[ ] in the United States," Mem. 8, it strongly reaffirmed *Quirin*, see *id.* at 2642-2643 (plurality); *id.* at 2682 (Thomas, J., dissenting), which remains a unanimous, binding, and apposite decision of the Supreme Court, and which answered that precise question in the affirmative. Again, *Quirin* upheld the President's exercise of military jurisdiction over a group of German combatants who were seized by FBI agents in Washington, D.C., New York City, and Chicago before they could carry out plans to sabotage various domestic targets during World War II. 317 U.S. at 21-22; see Louis Fisher, Congressional Research Service, *Military Tribunals: The* Quirin *Precedent* 2 (2002) (noting that at least two of the saboteurs, Dasch and Burger, were arrested in their respective hotels in Washington and New York), *available at* <http://www.fas.org/irp/crs/RL31340.pdf>. The *Quirin* Court emphatically rejected any suggestion that the saboteurs were "any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." 317 U.S. at 38; see *United States* v. *McDonald*, 265 F. 754, 764 (E.D.N.Y. 1920), appeal dismissed, 256 U.S. 705 (1921) ("With the progress made in obtaining ways and

means for devastation and destruction, the territory of the United States was certainly within the field of active operations."). Thus, *Quirin* controls this case.

3. Petitioner unsuccessfully attempts to blunt the plain import of *Quirin* by arguing that it "was a narrow decision, explicitly confined to the precise facts before the Court." Mem. 32. While it is true that the *Quirin* Court did not "define with meticulous care the ultimate boundaries of [military] jurisdiction," 317 U.S. at 45-46, petitioner's case is nowhere near those margins; the "precise facts" of *Quirin* were indistinguishable in every material respect from the instant facts. There, the combatants were affiliated with German forces during World War II, received explosives training in Germany, and came to the United States with plans to destroy domestic targets. 317 U.S. at 21. Here, petitioner was closely associated with al Qaeda after September 11, 2001, received explosives training at al Qaeda training camps, and then came to the United States at al Qaeda's direction and with its assistance to advance the conduct of further attacks against the United States.[7] Given these factual parallels—as well as the President's determination that petitioner is "closely associated with al Qaeda" and has "engaged in * * * hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States," President's Order ¶¶ 2-3—there can be no doubt that petitioner falls squarely within *Quirin*'s core holding: "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of * * * the law of war." 317 U.S. at 37-38.

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[7] Also like the *Quirin* saboteurs—who received from the German government "substantial sums in United States currency, which were in their possession when arrested," 317 U.S. at 21-22—petitioner received $15,000 from senior al Qaeda operatives and was carrying over $10,000 when arrested. See Rapp Dec. ¶¶ 12-13.

a. Petitioner's attempt to distinguish himself from the *Quirin* combatants on grounds that each of them "wore a military uniform when landing * * * in the United States" and "conceded being a soldier in the [German] military," Mem. 33 (citing *Quirin*, 317 U.S. at 21), is factually misleading and legally irrelevant. The *Quirin* opinion reports no such concession of enrollment. In fact, "only two" of the saboteurs, Burger and Neubauer, "were formally enrolled in the German army."[8] Michael Dobbs, *Saboteurs: The Nazi Raid on America* 204 (2004). Indeed, the *Quirin* saboteurs, like petitioner, were recruited from civilian life precisely because of their ability to blend in once they arrived in the United States. In keeping with that objective, the combatants "buried their uniforms" "[i]mmediately after landing" in the United States and "proceeded in civilian dress."[9] 317 U.S. at 21.

In recognition of the fact that the majority of the saboteurs were not formally enrolled in the German forces, the *Quirin* Court held broadly that persons "who *associate* themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of * * * the law of war." 317 U.S.

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[8] Petitioner contends that "recent historical commentary suggesting that some of the *Quirin* saboteurs were actually not soldiers is beside the point, since the Supreme Court plainly assumed that they were soldiers." Mem. 21 n.16 (citing *Quirin*, 317 U.S. at 22). Nothing on the cited page of *Quirin*, or anywhere else in the opinion, suggests the Court erroneously assumed that the saboteurs were formally enrolled in the German army. To the contrary, the government had emphasized in its brief in *Quirin* that "civilians as well as soldiers are all within th[e] scope" of the war crimes charged. Gov't Br. 39, *Quirin*.

[9] As the District Court for the Southern District of New York observed in the first iteration of this case, the saboteurs were wearing uniforms initially upon coming ashore only to preserve a plausible claim to prisoner-of-war status should they have been captured during the landing. See *Padilla* v. *Rumsfeld*, 233 F. Supp. 2d 564, 594 n.12 (S.D.N.Y. 2002) ("[T]hose who organized the mission well understood the rules of war, and understood also that if the saboteurs were captured during the landing, when they were particularly vulnerable to detection, and were not wearing uniforms, they would have no hope of being classified as lawful combatants.").

at 37-38 (emphasis added). The Court likewise reiterated later in its opinion that a "non-belligerent" is a person who is not "a part of *or associated with* the armed forces of the enemy." *Id.* at 45 (emphasis added). The Court's use of the disjunctive precludes any argument based on formal membership rather than association. Accord *id.* at 35 n.12 (discussing "acts which, when committed within enemy lines by persons in civilian dress *associated with* or acting under the direction of enemy forces" (emphasis added)); see also *Hamdi*, 124 S. Ct. 2639-2640 (plurality) (holding that an individual who is, *inter alia*, "part of *or supporting* forces hostile to the United States" is an enemy combatant (emphasis added)); *Eisentrager*, 339 U.S. at 765 (dismissing as "immaterial" whether Germans were affiliated with civilian agency or military).

Moreover, any distinction based on formal membership could not withstand scrutiny. Under petitioner's view, Germany could have immunized all of the saboteurs from treatment as enemy combatants simply by refraining from formally inducting them into the armed forces. That rationale would stand the laws of war on their head, affording more protection to, and exempting entirely from the laws of war, enemy forces that violate the basic conditions for lawful belligerency—such as having a responsible command structure and wearing fixed insignia openly identifying association with enemy forces.[10] See, *e.g.*, Ingrid Detter, *The Law of War* 136 (2d ed. 2000). The President's finding that petitioner is "closely associated with al Qaeda," President's Order ¶ 2, places petitioner squarely within *Quirin*'s scope. And there can be no doubt that a person who stays at al Qaeda

[10] A rationale based on formal membership would also ignore the nature of the current conflict against al Qaeda, a terrorist network that does not wage war using conventional forces with formal command structures, membership ranks, and insignia. Indeed, because "[a]l Qaeda has no clear membership standards," "enrollment" in the network is largely an irrelevant concept. Audrey Kurth Cronin, Congressional Research Service, *Al Qaeda After the Iraq Conflict* 3 n.10 (2003), *available at* <http://www.fas.org/irp/crs/RS21529.pdf>.

safehouses, travels with other al Qaeda operatives while armed with an assault rifle in an effort to evade United States forces, meets repeatedly with senior al Qaeda operatives to discuss the conduct of terrorist operations on al Qaeda's behalf, and receives explosives training from al Qaeda operatives at the direction of al Qaeda leaders, is sufficiently "associated with" al Qaeda by any measure to qualify as an enemy combatant.

b. Finally, it is irrelevant under *Quirin* that petitioner was neither armed nor "directly participating in combat" when he was arrested. Mem. 33 & n.26. While it is true that the saboteurs in *Quirin* were "armed with explosives" when they landed in the United States, *id.* at 33, they buried the explosives immediately upon arrival, 317 U.S. at 21; see Fisher, *supra*, at 2, and were apparently unarmed when they were arrested. More significantly, the *Quirin* Court explicitly dispelled any notion that the saboteurs were "any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." 317 U.S. at 38; see *supra* p. 14. Rather, it was enough that they, like petitioner, "enter[ed] this country bent on hostile acts" with the "aid, guidance and direction" of the enemy. 317 U.S. at 37-38.

4. In light of *Hamdi* and *Quirin*, there is no merit to petitioner's contention (*e.g.*, Mem. 9) that, unless Congress suspends the writ of habeas corpus, petitioner must be charged with a crime or released immediately. To be sure, a dissenting opinion in *Hamdi* expressed the view of two Justices that, in the absence of a suspension of the writ, an American citizen detained in the United States must be afforded criminal process. See 124 S. Ct. at 2660-2674 (Scalia, J., joined by Stevens, J., dissenting). No other Justice endorsed that approach, however, and a majority of the Court specifically rejected it. See *id.* at 2643 (plurality) (rejecting approach "in which the only options are

congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime"); *id.* at 2682 (Thomas, J., dissenting) (rejecting "conclusion that the Government must choose between using standard criminal processes and suspending the writ").

Petitioner's continued reliance (Mem. 29-33) on *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in support of this line of reasoning is misplaced. *Milligan* held that the military lacked authority to subject to trial by military commission a citizen who was alleged to have conspired against the United States in the Civil War. Unlike petitioner and the *Quirin* combatants, Milligan had not affiliated or trained with enemy forces (and had in fact never resided in any State in the Confederacy). See *id.* at 121-122. In *Quirin*, the Court unanimously confined *Milligan* to its specific facts, "construi[ing] the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it." 317 U.S. at 45. The Court found *Milligan* "inapplicable" to the circumstances in *Quirin*, explaining that Milligan, "not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." *Ibid.* Petitioner, by contrast, was closely associated with al Qaeda, and his actions directly parallel those of the *Quirin* combatants. Accordingly, petitioner, as much as the *Quirin* saboteurs, is an "enemy belligerent[ ] within the meaning of * * * the law of war." *Id.* at 38.

Hamdi fortifies that conclusion. The controlling opinion in *Hamdi* explains that "*Quirin* was a unanimous opinion" that "both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances." 124 S. Ct. at 2643 (plurality); see *id.* at 2682 (Thomas, J., dissenting). Indeed, the *Hamdi* plurality reaffirmed *Quinn* in rejecting Justice Scalia's effort, indistinguishable from petitioners', to rely on *Milligan* as if *Quirin* never happened. *Id.* at 2643 (admonishing that

"[b]rushing aside such precedent * * * is unjustified and unwise"). *Hamdi* also confirms that while *Quirin* involved the detention of enemy combatants for trial by military commission, see Mem. 12-13 n.5, 33, the jurisdiction recognized in *Quirin* necessarily includes the basic authority to detain for the duration of a conflict without bringing any such charges. 124 S. Ct. at 2640 (plurality) ("While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.").[11]

II. Section 4001(a) Does Not Constrain The President's Authority To Detain Petitioner As An Enemy Combatant.

In addition to raising these constitutional arguments, petitioner contends that the AUMF does not authorize his detention with sufficient clarity to overcome 18 U.S.C. 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." This argument fails for two reasons: the AUMF is "an Act of Congress" authorizing the detention; and Section 4001(a) does not apply to the military's wartime detention of enemy combatants in any event.

A. The AUMF is "an Act of Congress" authorizing petitioner's detention as an enemy combatant.

The President's determination that petitioner should be detained as an enemy combatant falls well within the broad scope of authority Congress conferred on him through the AUMF. Although petitioner argues that a "clear statement" is required to authorize detention, the Supreme Court has

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[11] Although petitioner suggests that the current conflict is not a traditional war (Mem. 21-22), there is no question that the country is at war with al Qaeda. The President expressly determined so after Congress authorized the conduct of war against persons and organizations responsible for the September 11 attacks. See p. 3, *supra*. In any event, whether there exists a state of armed conflict against an enemy to which the laws of war apply is a political question for the President, not the courts, to decide. See *Ludecke* v. *Watkins*, 335 U.S. 160, 170 (1948); *The Three Friends*, 166 U.S. 1, 63 (1897); *The Prize Cases*, 67 U.S. at 670.

held precisely the opposite. See Subsection 1, *infra*. In any event, *Hamdi* held that the AUMF authorizes detention of enemy combatants with sufficient clarity, and nothing in the AUMF suggests that enemy combatants captured in the United States should be treated more leniently than those captured abroad. See Ssubection 2.a, *infra*. Petitioner's contention that five Justices have suggested in dissents in different cases that they disagree with the latter point is factually incorrect and legally irrelevant. See Subsection 2.b, *infra*.

1. Contrary to petitioner's argument (Mem. 10-16), neither the Constitution nor Section 4001(a) requires a "clear statement of authority to detain." In ordering petitioner's detention, the President *explicitly invoked* the AUMF. President's Order, Preamble (declaring that the Order was rendered "consistent with the laws of the United States, including the Authorization for Use of Military Force"). When the President explicitly acts pursuant to a broad grant of authority from Congress in an area in which he also possesses independent constitutional powers, see *supra* pp. 10-11, the courts may set aside his action as beyond the scope of congressional delegation only in exceptional circumstances. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981) ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.' " (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))).

a. Thus, *Quirin* instructs that the controlling clear statement rule runs in the opposite direction of that suggested by petitioner: a "detention * * * ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" is "not to be set aside by the courts without the *clear conviction* that [it is] in conflict with

the * * * laws of Congress." 317 U.S. at 25 (emphasis added). The *Quirin* Court's application of that standard is instructive. Contrary to petitioner's argument (Mem. 12), the Articles of War then in effect did not provide "highly specific statutory authorization" to detain the saboteurs for trial by military commission. Indeed, the Articles at that time did not specifically provide that they applied to *enemy* forces at all. See 317 U.S. at 27. Article 2 (ch. 227, 41 Stat. 787), entitled "Persons Subject To Military Law," provided that the "following persons are subject to these articles," and the ensuing list referred only to United States personnel. Moreover, Article 15 (41 Stat. 790), on which the Court principally relied (317 U.S. at 28), did not affirmatively authorize a military commission but preserved, by negative implication, the common-law authorization of commissions: "[T]he provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions * * * of concurrent jurisdiction in respect of offenders or offenses that * * * by the law of war may be triable by such military commissions."[12] 317 U.S. at 27 (quotation omitted). In addition, the Court rested its decision on the general charge, not tethered to any specific Article, of a violation of the common "law of war," rather than relying on the more specific charges of war crimes codified by Congress in Articles 81 and 82, 41 Stat. 804. See 317 U.S. at 23, 46. These were not the actions of a Court searching for a clear statement from Congress.

None of the other cases petitioner cites supports a constitutionally-based clear statement rule. In *Ex parte Endo*, 323 U.S. 283 (1944), the Court instructed that the "fact that the Act" at issue was "silent on detention" did "not of course mean that any power to detain [was] lacking." *Id.* at 301. Ultimately, the Court concluded that, because the statute had the "single aim" of protecting "the war effort against espionage and sabotage," it failed to support the detention of a concededly loyal

[12] The current version of this provision is codified at 10 U.S.C. 821.

citizen. *Id.* at 300. "Detention which furthered the campaign against espionage and sabotage would be one thing," the Court explained, "[b]ut detention which has no relationship to that campaign is of a distinct character." *Id.* at 302. In this case, by contrast, Congress sought to "prevent any future acts of international terrorism against the United States" by those individuals and organizations responsible for the September 11 attacks. 115 Stat. 224, § 2(a). The military detention of petitioner—who stayed at al Qaeda safehouses, traveled with other al Qaeda operatives while armed with an assault rifle in an effort to evade United States forces, met repeatedly with senior al Qaeda operatives to discuss the conduct of terrorist operations in the United States on al Qaeda's behalf, and received explosives training from al Qaeda operatives at the direction of al Qaeda leaders—has an obvious "relationship to [Congress's] campaign" against "future acts of international terrorism against the United States." Under the logic of *Endo*, the "fact that the [AUMF]" is "silent on detention" "does not * * * mean that any power to detain is lacking." *Id.* at 301. Imposing a constitutionally-based clear-statement rule would therefore be patently inappropriate.[13]

b. Relying on the Second Circuit's now-reversed decision from the first round of this

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[13] The other cases cited by petitioner in support of a clear-statement rule are plainly inapposite. In *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), the question was whether individuals charged with ordinary *civilian* crimes could be charged before a military commission. *Id.* at 307-310, 313. In answering that question in the negative, the Court distinguished *Quirin* and other military-commission cases, making clear that "[o]ur question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or *enemy belligerents*." *Id.* at 313 & n.8 (emphasis added). *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), held that the declaration of war in the War of 1812 did not of its own force permit seizure of personal property belonging to an enemy alien found in this country. That holding was founded on a law-of-war rule concerning personal property unconnected to hostilities, which rule has no application to personal property usable for a war-related purpose, much less to detention of enemy combatants. See William Winthrop, *Military Law and Precedents* 780 (2d ed. 1920) ("Private property * * * is now in general regarded as property exempt from seizure except where suitable for military use or of a hostile character.").

litigation (Mem. 13), petitioner also errs in arguing for a clear-statement rule derived from Section 4001(a). The Second Circuit concluded that "precise and specific language authorizing the detention of American citizens is required to override [Section 4001(a)'s] prohibition." *Padilla*, 352 F.3d at 720. Yet the Supreme Court specifically rejected this very notion a few months later in *Hamdi*, concluding that "the AUMF satisfie[s] § 4001(a)'s requirement that a detention be 'pursuant to an Act of Congress,'" 124 S. Ct. at 2640 (plurality), even though "the AUMF does not use specific language of detention," *id.* at 2641 (plurality); see *id.* at 2679 (Thomas, J., dissenting). Although petitioner suggests in passing that Section 4001(a) should apply with greater force to domestic seizures than to overseas seizures (Mem. 16 n.10), Section 4001(a) regulates detention, not capture. Petitioner is *detained* in the same facility Hamdi was, and nothing in Section 4001(a) draws any distinction based on the locus of capture. This Court need go no further than *Hamdi* to reject petitioner's argument for a clear-statement requirement, although it bears noting that no precedential federal case of which respondent is aware has construed Section 4001(a) to require a clear statement of authority to detain even in the civilian context.

2. Faced with *Hamdi*'s conclusion that the AUMF authorized the military detention of Hamdi, an American citizen, see *supra* pp. 8-9—and that the detention was thus "pursuant to an Act of Congress" within the meaning of Section 4001(a), 124 S. Ct. at 2639-2640 (plurality); *id.* at 2679 (Thomas, J., dissenting)—petitioner seeks to distinguish that case by arguing that the AUMF does not authorize detention of persons "seized on U.S. soil." *E.g.*, Mem. 5; see Pet. 5, ¶ 25. Petitioner's reading of the AUMF is untenable.

a. The AUMF specifically recognizes the President's constitutional authority "to take action to deter and prevent acts of international terrorism." 115 Stat. 224, Preamble. It broadly

authorizes the President "to use *all* necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent *any* future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224, § 2(a) (emphases added). Nothing in those sweeping terms distinguishes between combatants seized abroad and those seized on United States soil, much less indicates that detention of the former, but not the latter, is authorized.

To the contrary, in enacting the AUMF, Congress was directly responding to attacks on the United States homeland, launched a week earlier by combatants who were within the Nation's borders. The manifest purpose of Congress was to authorize actions to prevent another September 11. See 115 Stat. 224, § 2(a). Accordingly, the AUMF cannot plausibly be read to authorize detentions abroad while simultaneously withholding support for the detention of combatants found within the United States — *i.e.*, combatants identically situated to those that carried out the September 11 attacks. See *Reves* v. *Ernst & Young*, 494 U.S. 56, 63 (1990) (a statute "must be understood against the backdrop of what Congress was attempting to accomplish in enacting" it).

Moreover, Congress observed in the AUMF that persons who would undertake attacks like those that occurred on September 11 "continue to pose an unusual and extraordinary threat to the national security," and that, accordingly, it is "necessary and appropriate that the United States exercise its rights * * * to protect United States citizens both *at home* and abroad." 115 Stat. 224, Preamble (emphasis added). Congress was also acting against the backdrop of *Quirin*, which had long ago established that the military's authority to seize and detain enemy combatants fully applies to combatants who are arrested, unarmed, in civilian contexts within the United States. *Supra* pp.

14-18; see *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988) (noting the "well-settled presumption that Congress understands the state of existing law when it legislates"). The AUMF gives no indication that Congress intended to depart from that settled understanding, see *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998) (courts "will not read [a statute] to erode past * * * practice absent a clear indication that Congress intended such a departure" (quotation omitted)), and the nature of the September 11 attacks forecloses any such interpretation.[14]

Petitioner argues (Mem. 17-18 & nn.11-13) that the AUMF should be construed narrowly to avoid rendering certain provisions of the Patriot Act superfluous. That argument is baseless. The cited provisions of the Patriot Act authorize the Attorney General to detain, in times of peace and war, all resident aliens—not only enemy combatants—who are suspected of terrorist activity, espionage, illegal export, or "any other activity that endangers the national security." 8 U.S.C. 1226a(a) (Supp. I 2001). The statute thereby *expands* the government's authority to detain aliens in a wide variety of circumstances; in no way does it express an intent to *limit* or in any way effect the President's longstanding authority to detain enemy combatants in a time of war.

Even if there were any doubt about whether the AUMF encompasses combatants seized within the United States, such doubt would be resolved in favor of the President's determination that Congress did in fact authorize petitioner's detention. President's Order, Preamble (declaring that petitioner's detention is "consistent with the laws of the United States, including the Authorization

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[14] The debates in Congress reflect the understanding that the President may be required to take action against the enemy within the Nation's borders. See Cong. Rec. H5660 (Sept. 14, 2001) ("This will be a battle unlike any other, fought with new tools and methods; fought with intelligence and brute force, rooting out the enemies among us and those outside our borders.") (Rep. Menendez); H5669 ("We are facing a different kind of war requiring a different kind of response. We will need more vigilance at home and more cooperation abroad.") (Rep. Velasquez).

for Use of Military Force"). Congressional authorizations of Executive action in the areas of foreign policy and national security must be read broadly, especially where, as here, the President enjoys his own constitutional authority. As the Supreme Court has explained, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take," and "[s]uch failure of Congress * * * does not, 'especially * * * in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore*, 453 U.S. at 678 (quoting *Haig* v. *Agee*, 453 U.S. 280, 291 (1981)).

b. Petitioner nonetheless predicts that a majority of the Court—Justices Stevens and Scalia (who dissented in *Hamdi*), Justices Souter and Ginsburg (who dissented in part in *Hamdi*), and Justice Breyer (who joined the dissent in *Padilla*)—would conclude that the AUMF did not authorize petitioner's detention. Petitioner's attempt to predict votes based on Justice Stevens' dissent in *Padilla* is based entirely on one sentence in one footnote that is phrased in the first person, singular. This solitary sentence in a dissent cannot bear the weight petitioner would give it. For one thing, the sentence is ambiguous: it states that Section 4001(a) prohibits "the protracted, *incommunicado* detention of American citizens arrested in the United States." 124 S. Ct. at 2735 n.8 (emphasis added). Because petitioner is no longer held incommunicado, the sentence in question does not necessarily speak to the circumstances of this case.

More fundamentally, petitioner's vote-counting technique fails *ab initio* because the task of district and circuit courts "is not to predict what the Supreme Court might do but rather to follow what it has done." *West* v. *Anne Arundel County*, 137 F.3d 752, 757 (4th Cir.), cert. denied, 525 U.S. 1048 (1998). Thus, the Supreme Court has stressed that views in separate concurring and dissenting decisions *in the same case* should not be added up to form a holding, as petitioner would have it.

See *Agostini* v. *Felton*, 521 U.S. 203, 217 (1997) (cautioning that "[t]he views of five Justices," if expressed in concurring or dissenting opinions, "cannot be said to have effected a change in * * * law"); *United States v. Morrison*, 529 U.S. 598, 624 (2000) (rejecting effort to count votes by adding statement of three Justices in a concurring opinion to similar statement made by three Justices in a separate dissenting opinion, and noting that "this is simply not the way that reasoned constitutional adjudication proceeds"); *Brzonkala* v. *Virginia Polytechnic Institute*, 169 F.3d 820, 878 (4th Cir. 1999), aff'd sub nom. *Morrison*, *supra* ("[I]t goes without saying [that] the combination of these separately stated views by the concurring and dissenting Justices no more constitutes binding authority * * * than does either of the separate opinions standing alone."); cf. *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980) ("comments in [a] dissenting opinion * * * are just that: comments in a dissenting opinion"); *Garelick* v. *Sullivan*, 987 F.2d 913, 918 (2d Cir.) (a Justice's dissenting opinion is "just that" unless and until it "is adopted by a majority of the Court" in a given case), cert. denied, 510 U.S. 821 (1993). Petitioner's vote counting method is especially inappropriate here, where petitioner relies on dissenting opinions in *different* cases.

What the Court has actually held in the enemy-combatant context is that the AUMF grants the President authority to detain militarily an American citizen who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 124 S. Ct. at 2639 (plurality); see *id.* at 2679 (Thomas, J., dissenting). For reasons explained above, the Court's other precedents—as opposed to petitioner's cobbling together of statements in dissenting opinions in different cases—provide every reason to believe that the AUMF confers similar authority with respect to citizens seized within the United States. See, *e.g.*, *Quirin*, 317 U.S. at 37-38.

B. Section 4001(a) does not apply to the wartime detention of enemy combatants by the military.

Because the Court in *Hamdi* concluded that the AUMF authorized Hamdi's detention, it had no occasion to address whether Section 4001(a) applies to the military detention of enemy combatants. See 124 S. Ct. at 2639 (plurality). This Court, for the same reason, need not reach the issue either.

But if this Court were to reach the issue, Section 4001(a) has no bearing on the military's authority to detain enemy combatants in wartime. Congress made clear its intent that Section 4001(a) speak solely to civilian detentions by deliberately styling the provision as an amendment to an existing provision in United States Code Title 18 ("Crimes and Criminal Procedure") rather than Title 10 ("Armed Forces") or Title 50 ("War and National Defense"). That existing provision (see 18 U.S.C. 4001 (1970)) was directed to the Attorney General's control over federal prisons; its terms, which remain unchanged, stated that the "control and management of Federal penal and correctional institutions, *except military or naval institutions*, shall be vested in the Attorney General." 18 U.S.C. 4001(b)(1) (emphasis added). If Section 4001(a) were meant to constrain the President's authority over enemy combatants, and had it been included in Title 10 or Title 50 alongside other provisions relevant to the war power, Members of Congress may have alluded to the provision in debating the AUMF. But no Member did so. By contrast, the Members mentioned the War Powers Resolution, codified in Title 50, over 50 times in the legislative debates and specifically referenced it in the Authorization.

The legislative history of Section 4001(a) itself reinforces the conclusion that the provision does not constrain the President's authority to detain enemy combatants militarily. That history

makes clear that the provision was intended to address the detention of citizens by civilian authorities (as opposed to enemy combatants by military authorities) — in particular, the detention authority given the Attorney General in the Emergency Detention Act of 1950 and the detention camps instituted for Japanese-American citizens during World War II. See H.R. Rep. No. 116, 92d Cong., 1st Sess. 2 (1971). Petitioner argues (Mem. 14) that the World War II camps "were directly and heavily controlled by military commanders," and contends more generally (*ibid.*) that Congress could not have perceived any significant distinction based on whether the detention of a citizen was at the hands of civilian or military authorities. But the distinction between detention of loyal citizens by civilian authorities as a precautionary measure, and the detention of enemy combatants by military authorities, was drawn by the Supreme Court in *Endo*. In ordering the release of a concededly loyal citizen from a World War II detention camp, the *Endo* Court "noted at the outset" that it did not confront "a question such as was presented in [*Quirin* or *Milligan*] where the jurisdiction of military tribunals * * * was challenged." 323 U.S. at 297. The Court stressed that Endo was "detained by a civilian agency, the War Relocation Authority, not by the military," and that, "[a]ccordingly, no questions of military law [were] involved." *Id.* at 298.

Conversely, there is simply no mention in Section 4001(a)'s legislative history of any intent to limit the military's long-settled authority under *Quirin* to detain enemy combatants who are American citizens. Any such reading of Section 4001(a) would not only be inconsistent with the provision's evident purpose, structure, and location in the Code, it would also raise serious constitutional questions concerning the extent to which Congress may restrict the President's basic authority as Commander in Chief to seize and detain enemy combatants. See *Public Citizen* v. *Dep't of Justice*, 491 U.S. 440, 466 (1989) ("Our reluctance to decide constitutional issues is especially

great where, as here, they concern the relative powers of coordinate branches of government. Hence, we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils." (citation omitted)).

CONCLUSION

Petitioner's motion for summary judgment should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Jose Padilla, Petitioner, vs. Commander C.T. Hanft, U.S.N. Commander Consolidated Naval Brig. Respondent.	)	CIVIL ACTION NO. 02:04-2221-26AJ

CERTIFICATE OF SERVICE BY FAX and U.S. MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the District of South Carolina and is a person of such age and discretion as to be competent to serve papers.

That on November 22, 2004, she served copies of the attached

RESPONDENT'S OPPOSITION TO THE MOTION FOR SUMMARY JUDGEMENT

by placing said copies in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es), and by depositing said envelope and contents in the United States Mail at U.S. Attorney's Office, 151 Meeting Street, Suite 200, Charleston, SC 29401 and by facsimile at (843) 577-9826.

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